

N A R U C



November 20, 1998

EX PARTE OR LATE FILED

The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RE: Ex Parte Comments – Two Copies filed

*In the Matter of Amendment of the Commission's Ex Parte Rules in  
Joint Board Proceedings GC Docket No. 98-73*

Dear Chairman Kennard,

As you know, in July, the Commission voted out the notice of proposed rulemaking in the above-captioned proceeding. The leadership of the National Association of Regulatory Utility Commissioners immediately filed an *ex parte* expressing personal appreciation for the efforts you and each of your federal colleagues expended to move this item.

**I. EX PARTE CONTACTS:**

During the course of our summer meetings in Seattle, I had brief conversations with Commissioner Ness and Jim Casserly outlining NARUC's recently adopted resolution on the NPRM. Immediately after the meetings I supplied Ken Moran and others at the Commission, on request, with copies all resolutions that passed during the course of that meeting. A number of other discussions about the resolution in draft form may well have taken place between various NARUC Staff Subcommittee members and members of the FCC attending the meeting. As I was drafting this letter, it occurred to me that those contacts might require an *ex parte* notice to be filed under the FCC's rules. Out of an abundance of caution, I am including them in this notice.

Also, on October 15, 1998, I met for approximately one hour with David Senzel and Susan Steiman of the Office of General Counsel, and with Ms. Lisa Zaina of the Common Carrier Bureau for about 40 minutes. Later I had brief conversations with Jim Casserly to briefly discuss the meetings with Susan, Lisa, and David. The positions discussed during those meetings are outlined *infra*. Earlier the week before, I had a brief conversation with Kevin Martin to elicit Commissioner Furchtgott-Roth's views on the NPRM as it issued and mention that I would be getting back in touch with him to discuss NARUC's position after going over our resolution with the relevant OGC Staff.

The purpose of this letter is two-fold. First, I'm writing to comply with the FCC's *ex parte* regulations. I respectfully request any waivers needed to make this filing out-of-time. More importantly, *I'm also writing to urge you to seriously consider the modification suggested by NARUC in its resolution.*

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## **II. NARUC'S RESOLUTION**

NARUC's resolution makes two points:

First, as our earlier ex parte filing suggested, the resolution supports adoption of the NPRM proposal that written or oral presentations from State commissioners or State staff members to FCC commissioners or FCC staff members be exempt from ex parte restrictions, provided that they are not of substantial significance and are not clearly intended to affect the ultimate decision. This position generally support; and

Second, as to written or oral presentations or discussions among State commissioners or State staff members, the resolution urges the FCC to consider making the following communications exempt from ex parte restrictions, provided that new factual information that is relied upon in a final decision is disclosed not later than the time of issuance of the decision:

- a) All communications (and related materials) between State commissioners and staff; or in the alternative,
- b) Both of the following:
  - 1) all communications (and related materials) by State commissioners or staff made during meetings, both regular and special, both formal and informal, where attendance is limited to State commissioners, staff and FCC representatives, and at which the work of a Joint Board or the FCC in relation to a Joint Board proceeding, is discussed; and
  - 2) presentations by one or more State commissioners or staff members to one or more State members or staff members on a Joint Board, provided that the latter does not receive any written materials.

The resolution also specifically calls on the FCC to consider whether accepting these alternatives would be understood by Congress as needed to accommodate the special relationship between State Joint Board representatives and other State commissions.

## **III. RATIONALE FOR NARUC'S POSITION RE: STATE-TO-STATE CONTACTS**

It is clear the joint boards established under the Section 410 of the Communications Act of 1934 are designed to give all the States representatives on certain issues of mutual concern to State and Federal regulators at the adjudicatory level.

In the case of State-specific disputes under (a) the representative "character of the State participants is crystal clear and direct because the statute requires the FCC to appoint a member "from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed."

In the case of Joint Board's established pursuant to 410(c) it simply is not practical to have a State commissioner representative on the Joint Board from all 50 States, the U.S. Territories, and D.C. Accordingly, Congress chose to allow NARUC to appoint "representatives" to represent ALL the States.

So, the FCC should modify the ex parte rules in a way that recognizes that State Commissioners that are not appointed to a particular Joint Board – are NOT the same as other parties to a Joint Board proceedings – at least with respect to their communications to their "representatives" on the Joint Board.

The Joint Board process was clearly established to give the Sovereign States, and their commissioners – *all of whom are sworn to protect the public interest just as their federal counterparts* - significantly greater access to and input into rules and procedures that clearly impact them and their obligations to serve the public interest directly and significantly.

As the events since the passage of the 1996 legislation have made very clear – the FCC's *ex parte* regulations have significantly inhibited free State commissioner-to-State Commissioner Joint Member discussions to the detriment of the Joint Board process.

NARUC's proposal is to reduce somewhat the filing requirements on communications ONLY between State Commissioners and their Congressionally specified "representative" State Commission Joint Board Members. The focus is not on the State to FCC proposal outlined in the FCC's NPRM. Such reduced requirements on State Commissioner-to-State Commissioner Joint Board Member contacts are consistent with existing *ex parte* regulations the FCC applies to its own communications with other agencies and the clear intent of Congress that sitting State members on Joint Boards represent the interests of all the States.

**Respectfully Submitted**



**James Bradford Ramsay**  
**NARUC's Assistant General Counsel**

cc: The Honorable Susan Ness  
The Honorable Gloria Tristani  
The Honorable Harold W. Furchtgott-Roth  
The Honorable Michael K Powell

## **Resolution Relating to Joint Boards and Ex Parte Presentations**

WHEREAS, The Federal Communications Commission ("FCC") generally characterizes proceedings relating to the Separations and Universal Service Joint Boards as "non-restricted" proceedings; and

WHEREAS, In non-restricted proceedings, a decision maker can make a presentation to a non-decision maker, without triggering any disclosure requirements, and a non-decision maker can make an oral or written presentation to a decision maker at most times, but must file a copy or a summary of the presentation with the FCC's Secretary on the same day; and

WHEREAS, Existing ex parte rules frequently require that a communication from one State commissioner to another, or from one State staff member to another, be memorialized by an ex parte filing, and this creates, from time to time, a barrier to effective communications among NARUC members; and

WHEREAS, The FCC recently issued a Notice of Proposed Rulemaking ("NPRM") in GC Docket No. 98-73 to facilitate greater communication by the States in Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board; and

WHEREAS, The NPRM proposed that in a matter involving a Joint Board recommendation, no ex parte notice would be required when a State commissioner or staff member makes a presentation to a Joint Board member or staff member, or an FCC Commissioner or staff member, but only if the presentation is not "of substantial significance and clearly intended to affect the ultimate decision;" and

WHEREAS, This NPRM would permit State commissions the same opportunity to communicate with the FCC and the Joint Board members and staff that FCC rules today offer to members of Congress and their staffs; and

WHEREAS, State Joint Board members and State staff represent all State commissions and, as representatives, should be permitted free and unfettered communications with their constituents, without having to comply with burdensome ex parte requirements; now, therefore, be it

RESOLVED, By the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, that the FCC is commended for issuing an NPRM to facilitate greater communication by the States in Joint Board proceedings; and be it further

RESOLVED, That this NPRM offers the States a significant opportunity to improve communications between NARUC members and the FCC, in part by permitting State Joint Board members and staff to learn more about the views of their State peers, and also by permitting non-Joint Board members and staff to learn more about the views of others concerning contemplated actions before those actions are publicly announced; and be it further

RESOLVED, That the NARUC General Counsel be directed to file comments in GC Docket No. 98-73 as follows:

1. As to written or oral presentations from State commissioners or State staff members to FCC commissioners or FCC staff members, NARUC supports adoption of a proposed rule which would exempt such presentations from ex parte restrictions, provided that they are not of substantial significance and are not clearly intended to affect the ultimate decision.

2. As to written or oral presentations or discussions among State commissioners or State staff members, NARUC urges the FCC to consider making the following communications exempt from ex parte restrictions, provided that new factual information that is relied upon in a final decision is disclosed not later than the time of issuance of the decision:

a. All communications (and related materials) between State commissioners and staff; or in the alternative,

b. Both of the following:

1) all communications (and related materials) by State commissioners or staff made during meetings, both regular and special, both formal and informal, where attendance is limited to State commissioners, staff and FCC representatives, and at which the work of a Joint Board or the FCC in relation to a Joint Board proceeding, is discussed; and

2) presentations by one or more State commissioners or staff members to one or more State members or staff members on a Joint Board, provided that the latter does not receive any written materials.

The FCC should also consider whether accepting these alternatives would be understood by Congress as needed to accommodate the special relationship between State Joint Board representatives and other State commissions.